IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL WRIT PETITION NO.1038 OF 2007

Jitendra Panchal,
Aged about 52 years, Indian
Inhabitant, residing at
9, Sarvodaya Society,
Mani Nagar, Ahmedabad. .... Petitioner

- Versus -

1. The Intelligence Officer,
   Narcotic Control Bureau,
   Mumbai.

2. The State of Maharashtra .... Respondents

Sarvasri Shirish Gupte, Senior Counsel, with
Taraq K. Sayed, Advocate, for the Petitioner.

Shri D.N. Salvi, Advocate, for the Respondent
No.1.

Shri A.S. Gadkari, Addl. Public Prosecutor,
for the Respondent No.2.

CORAM: R.M.S. KHANDEPARKAR &
Smt. V.K. TAHILRAMANI, JJ.

DATED: SEPTEMBER 19, 2007

JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Heard. Rule. The learned Advocates appearing on behalf of the respondents waive service on behalf of the respective respondents. By consent, rule made returnable forthwith.

2. By the present petition, the petitioner is challenging the order dated 25-4-2007 passed by the

Special Judge for the NDPS Court, Mumbai in Remand Application No.96 of 2007 in NDPS Special Case No.67 of 2007 while seeking to quash the prosecution in the said special case against the petitioner.

3. On 17-10-2002 the officers of the Detroit Field Office of the U.S. Drug Enforcement seized a consignment of 1243 pounds (565.2 Kgs.) of hashish in Newwark, U.S.A.. The said hashish was found concealed in a consignment of pickles of the company named Mahesh Food Products of Mumbai (India) and exported to a company called the House of Spice in Newwark, U.S.A.. The seizure of contraband goods was effected as a consequence of the joint operation carried out by the DEA of U.S.A., the Narcotic Control Bureau of India and the enforcement agencies in Germany and Austria. It appears that in the course of the investigation, it has been transpired that two persons, namely the petitioner herein and one Niranjan were engaged in trafficking hashish out of India to the U.S.A. as well as to the various destinations in Europe and the said seized quantity of hashish was also smuggled/exported out of India by the petitioner and the said Niranjan Shah, besides one Kishore was also involved in the said trafficking activities.

4. The petitioner came to be arrested by the officers

of the DEA, U.S.A. on 5-12-2002 in Vienna, Austria. The petitioner extradited to the U.S.A., and was tried before the U.S.A. District Courts, Eastern District of Michigan in Case No.04 CR 80571-1. The petitioner pleaded guilty to the charge of conspiracy to possess with intention to distribute and to distribute controlled substances which is an offence under Section 846 of Title 21 of the laws in force in U.S.A. in relation to Food and Drugs and consequently was sentenced under the Sentencing Review Act, 1984 and accordingly was ordered to be imprisoned for a total term of 54 months.

5. As a follow-up action of the joint operation, the officers of the NCB arrested Niranjan Shah, Kishore Joshi and Irfan Gazali in respect of their alleged roles in the said smuggling activities and are sought to be prosecuted in India.

6. After serving the sentence in U.S.A., the petitioner was deported to India and on his arrival at New Delhi on 5-4-2007, he was apprehended by the officers of the NCB. The petitioner was brought to Mumbai and pursuant to the orders passed by the learned Special Judge from 10-4-2007, the petitioner continued to be in custody. His application for bail came to be dismissed by the impugned order. In the said application, apart from

seeking bail, the petitioner sought to raise the point of double jeopardy and illegality in prosecuting the petitioner once the petitioner having been convicted for the same offence in U.S.A..

7. It is the case of the petitioner that the arrest, detention and prosecution of the petitioner in the case in hand is in flagrant violation of the constitutional protection envisaged under Article 20(2) of the Constitution of India as also in violation of the statutory provisions comprised under Section 300(1) of the Code of Criminal Procedure, 1973, hereinafter called as "the Code". The petitioner having been once prosecuted and punished for the same offence by a competent Court, it is not permissible for the NCB to prosecute the petitioner once again for the same offence. The Section 300(1) of the Code clearly bars the present prosecution in the facts and circumstances of the case as the charges which the prosecution intend to level against the petitioner are the charges of which he was accused of, or could have been accused of when the petitioner was initially arrested and no new facts are brought to the notice of the NCB so as to justify fresh prosecution on the basis of the same facts on which the petitioner was prosecuted by the competent Court in U.S.A. and was ultimately convicted. The petitioner having been prosecuted once in U.S.A. in

relation to the facts based on which the prosecution is trying to re-prosecute the petitioner without even any attempt being made by the NCB officers at any point of time to extradite the petitioner from the U.S.A., it is not permissible for the NCB to file complaint once again in relation to the same offence. According to the petitioner, he is sought to be charged and tried for the offence punishable under the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter called as "the NDPS Act" which is similar to the charge under Section 846 of Title 21 of the laws in force in relation to Food and Drugs in U.S.A.. The petitioner having been already convicted by the competent Court of Criminal Jurisdiction outside India under the law corresponding to the provisions of the NDPS Act for which he is sought to be prosecuted in India, such prosecution is barred in terms of Article 20 of the Constitution of India r/w Section 300(1) of the Code and Section 26 of the General Clauses Act. Ignoring all these provisions of law, the impugned order having been passed and the prosecution having been launched against the petitioner, it is the contention of the petitioner that while setting aside the impugned order, the entire prosecution needs to be quashed.

8. The learned counsel appearing for the petitioner, while drawing attention to the decisions in the matters

of **Maqbool Hussain v. State of Bombay,** reported in 1953 Cri.L.J. 1432 (SC), **Piara Singh v. The State of Punjab,** reported in AIR 1969 SC 961 and **Manipur Administration, Manipur v. Thokchom Bira Singh,** reported in AIR 1965 SC 87 submitted that the issue is whether the petitioner had been previously in jeopardy in respect of the charges for which he is sought to be prosecuted in India and whether the petitioner should be allowed to be put in peril twice for the same crime. According to him, the test to be applied is whether the former offence and the offence now charged have same ingredients in the sense that the facts constituting both the offences which are sought to be pleaded by the prosecution for two different trials are same and if the answer is in the affirmative, then the Court must quash such proceedings as the same is in violation of Article 20(3) of the Constitution of India and in contravention of Section 300(1) of the Code. It is sought to be contended that once the petitioner having been charged, tried and convicted for the offence in relation to the drugs, considering the ingredients of the offence for which he was tried and convicted and the ingredients of the offences for which he is sought to be prosecuted in India, it is apparent that the charges relate to the same offence or at least offences under two different statutes arise out of the same facts. Being so, if there was any doubt in the mind of the authorities as to

whether the petitioner should be prosecuted under the offences, as described under the law prevailing in U.S.A. or whether he should have been prosecuted under the law prevailing in India, the decision in that regard ought to have preceded the incident of initiation of criminal prosecution in U.S.A.. The petitioner having been once charged and tried and punished under one of these offences in one of the countries, question of the petitioner being again charged and tried for the same offence cannot arise and is not permissible. In that connection, attention is also sought to be drawn to Section 26 of the General Clauses Act, 1897.

9. The learned counsel appearing for the respondents, on the other hand, placing reliance in the decisions of the Apex Court in **V.K. Agarwal v. Vasantraj Bhagwanji Bhatia and others,** reported in AIR 1988 SC 1106, **A.A. Mulla and others v. State of Maharashtra and another,** reported in AIR 1997 SC 1441, **The State of Bombay v. S.L. Apte and another,** reported in AIR 1961 SC 578 and **Abdul Salam v. State of Kerala,** reported in 2003 (1) Crimes 471 submitted that the bar prescribed under the Constitution and the statutory provision is in relation to the same offence and it does not relate to offences which are distinct and separate, even though the facts disclosing such offences may be same.

10. The records of the case in hand apparently disclose that on 27-6-2006 the petitioner was prosecuted in New York, U.S.A. and held guilty of the offence of conspiracy to possess controlled substances in terms of the offence under Section 846 of Title 21 of the U.S. Laws regarding the drugs by the United States District Judge on 27-6-2006. He was accordingly committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 54 months. This fact is also confirmed by the letter dated 25-4-2007 by Shri Graham L. Teall, Assistant United States Attorney addressed to Mr. Taraq K. Sayed, Advocate for the petitioner at Mumbai. The letter clearly states that at the time of the arrest of the petitioner, he could have been prosecuted for importation of controlled substances into United States, attempted importation of controlled substances into the United States, aiding and abetting importation of controlled substances into the United States as well as conspiring to import controlled substances into the United States and conspiring to possess controlled substance with the intent to distribute them further. The petitioner, however, agreed to plead guilty and, therefore, he was charged by way of an information rather than indictment, with conspiring to possess controlled substances while all other charges were dropped. Apparently, therefore, the petitioner was charged and punished in the U.S.A. only

in relation to the charge of conspiracy to possess controlled substance in U.S.A. and he was neither tried nor punished for any other charge in relation to the acts done by the petitioner.

11. The relevant portion of the letter dated 25-4-2007, written by the Assistant United States Attorney and addressed to Mr. Taraq K. Sayed, Advocate for the petitioner herein and copy of which is to be found at page 17 of the petition, and which relates to the subject of prosecution and conviction of the petitioner herein in U.S.A., reads thus:

> "Mr. Panchal agreed to plead guilty and therefore was charged by way of an information rather than indictment, with conspiring to possess controlled substances. Because charging Mr. Panchal with the other importation crimes would have had no effect on the amount of time Mr. Panchal was sentenced to those charges were in effect dropped. Mr. Panchal went on to serve his time in an American prison and it is the position of this office that he has completely paid his debt to society and may now resume a productive

life."

12. The records, therefore, clearly disclose that the petitioner was charged and punished in U.S.A. for the offence of conspiring to possess 565.2 kgs. of hashish, under Section 846 r/w Section 841(A)(b)(1)(B)(vii) of Title 21 of the United States Drug Laws, which merely related to conspiracy to possess controlled substances in U.S.A. and nothing beyond it. As far as the complaint filed before the Special Judge for the NDPS cases is concerned, it discloses that the prosecution of the petitioner in India has been on account of conspiracy with other persons to purchase, acquire, possess, transport and import into Mumbai (India) from Kathmandu (Nepal) and export out of Mumbai (India) to New York (U.S.A.) and attempt to sell and dispose 1243 pound i.e. 565.2 kgs. of hashish concealed in a consignment of Priti brand pickles seized by the officers of the Directorate Enforcement Officers at New York on 17-10-2002 which is punishable under Sections 29, 20(b)(ii)(C), 23, 24, 27A and 28 r/w Sections 8(c) and 12 of the NDPS Act. The question, therefore, which arises is whether the ingredients of the offence for which the petitioner was tried and punished in U.S.A. are the same as those of the offences for which the petitioner is sought to be prosecuted in India?

13. Article 20 of the Constitution of India, undoubtedly, prohibits prosecution and punishment to a person for the same offence more than once. It incorporates the rule against double jeopardy. But it is different from the one found in U.S.A. and U.K. in the sense that it restricts the principle of "autrefois convict" and does not extend to that of "autrefois acquit". The Article 20(2) to be operative, both prosecution and punishment must co-exist. The prosecution simpliciter sans the punishment, would not attract the said constitutional mandate. In other words, Article 20(2) would become operative in a case when the second prosecution and punishment is for the identical offence for which the person concerned had already been prosecuted and punished earlier. The same offence would essentially mean the offence whose ingredients are same. At the same time, if one and the same act of a person constitutes two different or distinct offences, then the prosecution and punishment for one offence would not bar prosecution and punishment for the other offence. If the same set of facts constitute offences under more than one provision of law, then it will not attract the principle of double jeopardy, and separate prosecution and punishment for such distinct offences would not be barred. If there are two distinct and separate offences with different ingredients under two different enactments are disclosed

and established from same set of facts, then a double punishment is not barred, and the principle of double jeopardy is not attracted.

14. The principle of double jeopardy incorporated in Article 20(2) of the Constitution of India has been explained by the Apex Court in **S.L. Apte's** case (supra) as under:

> "To operate as a bar the second prosecution and the consequential punishment thereunder, must be for "the same offence". The crucial requirement therefore for attracting the Article is that the offences are the same, i.e., they should be identical. If, however, the two offences are different, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is, therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out."

The Apex Court in S.L. Apte's case was dealing with a matter wherein the accused was prosecuted and punished under Section 409 of IPC and under Section 105 of the Indian Insurance Act in the trial Court. In appeal, the conviction under Section 409 of IPC was confirmed but the one under Section 105 of the Insurance Act was set aside on account of absence of sanction under Section 107 of the Insurance Act which was a prerequisite for initiating prosecution under Section 105 of the Insurance Act. Subsequently, the insurance company obtained sanction of the Advocate General of Bombay under Section 107 of the Insurance Act and filed a complaint for prosecution under Section 105 thereof. Rejecting the challenge thereto, the Apex Court ruled that where the accused are sought to be punished for the offence under Section 105 of the Insurance Act after the trial and conviction for offence under Section 409 of IPC, thereby they are not being sought to be prosecuted for "same offence" but for two distinct offences constituted or made up of different ingredients, notwithstanding that the allegations of the facts in two complaints might be substantially similar, the benefit of bar under Article 20(2) of the Constitution and Section 26 of the General Clauses Act is not applicable in such cases. Besides, it should not be forgotten that conspiracy to commit a crime is itself an offence distinct and separate from the crime which is the object

of such conspiracy.

15. The Apex Court in **Maqbool Hussain's** case (supra) held that the words "before a Court of law or judicial tribunal" are not to be found in Article 20(2), yet in order to invoke the protection of Article 20(2), there must have been a prosecution and punishment in respect of the same offence before a Court of law or tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer. The Article contemplates proceedings of criminal nature before a Court of law in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure. It was also held that Article 20(2) incorporates within its scope the plea of "autrefois convict" as known to British jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribes it by providing that there should not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence.

16. In **Manipur Administration's** case (supra), the Apex Court held that the bar provided under Article 20(2) of the Constitution, as well as under Section 26 of the General Clauses Act, for the second prosecution and the

consequential punishment thereunder it must be for the same offence i.e., the offence whose ingredients are same and the Vth Amendment of the American Constitution which provides that no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb, proceeds on the same principle.

17. In **State of Bihar v. Murad Ali Khan,** reported in AIR 1989 SC 1, the Apex Court while dealing with the principle of double jeopardy and taking into consideration the provisions of Section 26 of the General Clauses Act, had held that:

> "In order that the prohibition is attracted the same act must constitute an offence under more than one Act. If there are two distinct and separate offences with different ingredients under two different enactments, a double punishment is not barred."

In that regard, the decision in in the **State of Bombay v. S.L. Apte's** case (supra) was reiterated and it was held that:

> "The same set of facts, in conceivable cases, can constitute offences under two

> different laws. An act or an omission can amount to and constitute an offence under the IPC and at the same time constitute an offence under any other law."

18. Similarly, in **Mohinder Singh v. State of Punjab,** reported in (1998) 7 SCC 390, Mohinder was convicted in Special Sessions Case No.6 of 1995 under Section 25 of the Arms Act, 1959 and Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 by the Designated Court, Sangrur on having found in possession of Sten gun bearing No.13303 and two magazines containing in all 12 live cartridges. He was also prosecuted in Special Sessions Case No.5 of 1995 along with other co-accused and was tried for possession of the same Sten gun with 12 live cartridges. The point which was sought to be raised was that the question of possession of Sten gun having been considered and dealt with and Mohinder having been punished in Special Sessions Case No.6 of 1995, could not be considered and tried again in Special Sessions Case No.5 of 1995. The contention was rejected being misconceived holding that in Special Sessions Case No.5 of 1995, Mohinder Singh was tried along with four other accused for the offence punishable under Sections 399 and 402 of IPC and Section 3 of TADA Act. He was not tried in that case for

possession of the fire-arm without a valid licence nor he was tried for the offence punishable under Section 5 of the TADA Act and, therefore, Mohinder was not tried earlier for the same offence and hence there was no question of applicability of double jeopardy. The trial in Special Sessions Case No.5 of 1995 was for different offences. The contention with reference to Section 220 of the Criminal Procedure Code was also rejected while observing that the said provision is an enabling provision which permits the Court to try more than one offence in one trial but the Court may or may not try all such offences in one trial and it cannot be said that by trying separately the Court committed any illegality.

19. In **Abdul Salam's** case (supra), the learned single Judge of the Kerala High Court while construing Section 188 and 300 of the Code, as also Article 20(2) of the Constitution, held that when a person, who had been prosecuted and punished in a foreign country for an offence under the law in force in that country, is prosecuted in India for the commission of an offence, he is being prosecuted for an offence under the law in force in India and the prosecution in India is not for an act which was made an offence under the law in force in foreign country, but for the act which is an offence as per the law in India, the previous prosecution and

conviction or acquittal would not bar the subsequent prosecution and trial for a separate and distinct offence even though two offences arise out of the same facts since the identity of the offence is requisite for the application of Article 20(2).

20. In **Piara Singh's** case (supra), it was held that:

> "The principle of issue-estoppel is different from the principle of double jeopardy or autrefois acquit as embodied in S.403 of the Criminal Procedure Code. The principle of issue-estoppel is a different principle, viz., where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of S.403(2)

> Cr.P.C. For issue-estoppel to arise, there must have been distinctly raised and inevitably decided the same issue in the earlier proceedings between the same parties. Thus any issue as between State and one of the accused persons in the same litigation cannot operate as binding upon the State with regard to another accused."

21. Section 26 of the General Clauses Act provides that where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

22. In **S.L. Apte's** case (supra), the Apex Court had clearly ruled that the crucial requirement for attracting Article 20 of the Constitution is that the offences must be the same i.e., they should be identical. If two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of ban cannot be invoked and, therefore, it is necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and

see whether their identity is disclosed therein. It was further held that:

> "Though Section 26 in its opening words refer to 'the act or omission constituting an offence under two or more enactments,' the emphasis is not on the facts alleged in the two complaints but rather on the ingredients which constitute the two offences with which a person is charged. This is made clear by the concluding portion of the section which refers to 'shall not be liable to be punished twice for the same offence'. If the offences are not the same but are distinct, the ban imposed by this provision also cannot be invoked."

23. Section 300(1) of the Code provides that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might

have been convicted under sub-section (2) thereof. Section 221(1) of the Code provides that if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences. Sub-section (2) of Section 221 of the Code provides that if in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

24. While dealing with Section 300(1) of the Code, it is necessary to take note of the exceptions provided to the rule comprised under the said sub-section as also the explanation thereunder. The sub-section (3) of Section 300 of the Code provides that a person, convicted of any offence constituted by any act causing consequences which, together with such act, constitute a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened or were not known

to the Court to have happened, at the time when he was convicted. The sub-section (4) of Section 300 of the Code provides that a person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged. The explanation thereto provides that the dismissal of a complaint or the discharge of the accused is not an acquittal for the purposes of the said section.

25. It is, therefore, clear that to attract the provisions of Section 300(1) of the Code, it must be established that:

1.(a) A person has once been actually tried by a competent Court for same offence charged in the second trial; or

(b) Though not actually tried for the same offence charged in the second trial, the person could have been on the same facts charged with it under Section 221(1) or convicted of it under Section 221(2).

2. The person has been convicted or acquitted in the earlier trial, dismissal or discharge is not acquittal.

3. Conviction or acquittal is in force i.e. it has not been set aside by a superior Court.

The said Section 300 of the Code corresponds to Section 403 of the Code of Criminal Procedure, 1903.

26. In **State of Madhya Pradesh v. Veereshwar Rao Agnihotri,** reported in AIR 1957 SC 592, it was held that:

> "Section 403(1) has no application to the case where there was only one trial for several offences, of some of which the accused person was acquitted while being convicted of one. Thus where the accused was tried under S.5(2), Prevention of Corruption Act and S.409 Penal Code but was acquitted of the offence under Prevention of Corruption Act, there is no bar to his conviction under S.409 Penal Code.
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> Article 20 cannot apply because the

> accused was not prosecuted after he had already been tried and acquitted for the same offence in an earlier trial and, therefore, the well-known mixim "Nemo debet bis vexari, sl constat curice quod sit pro una et eadem causa" (No man shall be twice punished, if it appears to the court that it is for one and the same cause)" embodied in Art.20 cannot apply."

27. In **Kunjilal and another v. The State of Madhya Pradesh,** reported in AIR 1955 SC 280, inspite of the export of certain essential supplies such as rice and ghee was prohibited from Madhya Pradesh to any other State, three bullock-carts belonging to the appellants therein were found carrying bags of rice and tins of ghee to Uttar Pradesh border. A Head Constable, on receiving information, reached the spot, seized the prohibited goods and brought the carts backs to a place in Madhya Pradesh. When they reached the jungle near that place, the two appellants were alleged to have beaten the Head Constable and taken away the property seized. They were accordingly charged under Ss.332 and 392 I.P.C., for voluntarily causing hurt to public servant in the discharge of his duty as such public servant and also for robbing him of the goods seized by

him and convicted. It was sought to be contended that the appellants were already prosecuted for an offence under S.7, Essential Supplies (Temporary Powers) Act, 1946, for exporting the contraband goods and although they were convicted by the Magistrate they were acquitted on appeal by the Additional Sessions Judge, and that under S.403(1), Criminal P.C., the appellants who had once been tried for the offence and acquitted could not be tried against the same offence nor on the same facts for any other offence for which a different charge from the one made against them might have been made under S.236 or for which they might have been convicted under S.237. It was held that neither S.236 nor S.237 applied and that sub-s.(2) of S.403 furnished a complete answer to the contention raised on behalf of the appellants. The said appellants were not tried again for the same offence as contemplated under S.403(1) but for a distinct offence as contemplated by sub-s.(2). It is true that in order to sustain in the charge under Ss.332 and 392, I.P.C., the Court had to consider whether the seizure was legal and was made by a public servant in the discharge of his duty but once that was found against the said appellants the further question to be determined was as to whether they had committed the offence of robbing the Head Constable of the goods lawfully seized and whether they had voluntarily caused hurt to him while he was acting in

the discharge of his duties as a public servant.

28. In **A.A. Mulla's** case (supra), it was held that the acquittal of the accused, who were belonging to the Customs Department were found to have retained 9 gold bars from the bars recovered in a smuggling case and they were tried in Special Case No.8 of 1971 under Section 409 of the Indian Penal Code and Section 5(1)(c) Prevention of Corruption Act. The accused were acquitted in the said case but subsequently were sought to be tried for offence under Section 120-B of the Indian Penal Code r/w Sections 135 and 136 of the Customs Act and Section 85 of the Gold (Control) Act and Section 123 of the Foreign Exchange Regulation Act and Section 5 of the Imports and Exports (Control) Act. The accused sought to raise objection for this prosecution on the ground that the Court could not, as on the same facts, try the accused second time in view of Section 403 of the Cr.P.C., 1898. The contention was rejected on the ground that second trial was after obtaining the necessary sanction. Besides that, the ingredients of the offences in the two trials were different.

29. In **V.K. Agarwal's** case (supra), the accused were prosecuted for an offence punishable under S.111 read with S.135 of the Customs Act, 1962. One of the accused was convicted whereas other two accused were acquitted.

The same offenders were later on sought to be prosecuted under S.85 of the Gold (Control) Act, 1968 relying on the find of primary gold from the very same premises at the time and on the occasion of the very same raid which gave rise to the prosecution under the Customs Act which had culminated in the conviction of one of the accused and the acquittal of two accused. The High Court found that the subsequent trial was barred by virtue of S.403(1) of Criminal P.C., 1898. The Apex Court set aside the order of the High Court and held that S.403(1) would not come to rescue of the accused whereas S.403(2) of the Code clearly concludes the matter against them. It was further held that the accused could not be found guilty of both the offences in the context of possession of gold. If it was established that there was a prohibition against the import of gold and that he was found in possession of gold which he knew or had reason to believe was liable to confiscation, he would be guilty of that offence. He would also be guilty of an offence under the Gold (Control) Act provided the gold is of a purity of at least 9 carats. He would have violated the provisions of 'both' the Customs Act and the Gold (Control) Act if the aforesaid ingredients were established. It is not as if in case he was found guilty of an offence under the Customs Act, he could not have been found guilty under the Gold (Control) Act or vice versa. Upon being found guilty of both the

offences the Court may perhaps impose a concurrent sentence in respect of both the offences but the Court has also the power to direct that the sentence shall run consecutively. There is therefore no question of framing of an alternative charge one under the Customs Act, and the other under the Gold (Control) Act. If the ingredients of both the offences are satisfied the same act of possession of the gold would constitute an offence both under the Customs Act as also under the Gold (Control) Act. Such being the position it could not be said that they could have been tried on the same acts for an alternative charge in the context of S.236, Cr.P.C. at the time of the former proceedings. Therefore, it could not be said that the persons who are sought to be tried in the subsequent proceedings could have been tried on the same facts at the former trial under S.236. The facts constituting the offence under Customs Act are different and are not sufficient to justify the conviction under Gold Control Act. A separate charge-sheet could have been framed in respect of the distinct offence under Gold Control Act.

30. In the case in hand, it is evident that as far as Section 846 of Part-D (Offences and Penalties) Sub-Chapter I (Control and Enforcement) Chapter 13 (Drug Abuse Prevention and Control) of Title 21 of the law relating to Food and Drugs in U.S.A. is concerned, it

provides that any person who attempts or conspires to commit any offence defined under the said sub-chapter shall be subject to same penalties as those prescribed for the offence, the commission of which was the object of attempt or conspiracy. Section 841 of the said Chapter and Title enumerates unlawful and prohibited acts, and the penalties for commission of such unlawful and prohibited acts. The Clause (a) thereof provides that except as authorised by the said sub-chapter, it shall be lawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance. The Clause (b) thereof provides for penalties depending upon various circumstances in which the offence is disclosed. Accordingly, Section 841(b)(1)(B)(vii) any person who violates sub-section (a) above shall be sentenced, in case of violation of sub-section (a), involving 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana marihuana plants regardless of weight, such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance

shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorised in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual, or $5,000,000 if the defendant is other than an individual, or both.

31. As far as the provision of law under which the petitioner is sought to be prosecuted in India is concerned, the Section 8(c) of the NDPS Act prohibits purchase, acquisition, possession, importation into India and export out of India as well as the sale of narcotic drugs as well as hashish. In terms of Section 12, no person is permitted to engage in or to have control of any trade whereby a narcotic drug is obtained outside India and supplied to any person outside India without the previous authorisation of the Central Government and subject to conditions that may be imposed by the Government in that behalf. Section 20(b)(ii)(C) of the NDPS Act provides for punishment for those who in contravention of any provision of the NDPS Act or any rule or order made or condition of licence granted thereunder produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, and involves commercial quantity. Section 23 provides for punishment for illegal import into India, export from India or transhipment of narcotic drugs and psychotropic

substances. Section 24 thereof provides for punishment for external dealings in narcotic drugs and psychotropic substances in contravention of Section 12 and Section 27-A deals with the punishment for financing illicit traffic and harbouring offenders. Section 28 provides for punishment for attempts to commit offences under the NDPS Act. Section 29 provides for punishment for abetment and criminal conspiracy.

32. Perusal of the provisions of law under which the petitioner has been sought to be prosecuted in India would reveal that the ingredients of the said offences are totally different from those of the offence for which the petitioner was charged and punished in U.S.A.. The said offence apparently related to conspiracy for possession of controlled commodity in U.S.A.. The offence for which he was charged in U.S.A. neither related to any of the ingredients of the offences punishable under the provisions of the NDPS Act under which the petitioner is sought to be prosecuted in India, nor the same could be said to be an offence to which any of the provisions of law comprised under the NDPS Act would apply, nor the prosecution and punishment in U.S.A. can be said to be by the Court of competent jurisdiction in relation to the offences under the said sections of the NDPS Act nor even similar thereto. By no stretch of imagination, acquisition and possession of

hashish in India and importation into India from Nepal and exportation out of India as well as sale of hashish can be said to be the ingredient of the offence under Section 846 r/w Section 841 of Title 21 of the U.S. Drugs Laws, nor the petitioner was subjected to prosecution and/or punishment under any of such offences in U.S.A.. Similarly, conspiracy for all those acts in India was not the subject matter of prosecution and punishment by the District Court, New York, U.S.A.. Besides, the Court at Mumbai was not competent to deal with the offence under Section 846 r/w Section 841 of Title 21 of the U.S. Drugs Laws, nor the District Court at New York was competent to take cognizance of any of the offences under the NDPS Act committed in India. Merely because same set of facts gives rise to offences in India under the NDPS Act, the conviction under a totally different provisions of law arising out of the same set of facts would not bar the Court in Mumbai to deal with the matter against the petitioner nor the principle of double jeopardy is in any manner attracted in the case in hand.

33. It is also to be noted that in **Leo Roy Frey v. Superintendent, District Jail, Amritsar and another,** reported in AIR 1958 SC 119, while dealing with the issue relating to criminal conspiracy, it was held that:

> "The offence of conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed, equally the crime attempted or completed does not require the element of conspiracy as one of its ingredients. They are, therefore, quite separate offences."

34. For the reasons stated above, therefore, there is no substance in the contentions raised on behalf of the petitioner and the petition, therefore, fails and is hereby dismissed. The rule is discharged with no order as to costs.

(Smt.V.K.Tahilramani, J.) (R.M.S.Khandeparkar, J.)

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